

# MEDICAL MALPRACTICE INSURANCE IN ILLINOIS: WHERE WE'VE BEEN AND WHERE WE'RE GOING AFTER *LEBRON V. GOTTLIEB MEMORIAL HOSPITAL*, 930 N.E.2D 895 (ILL. 2010)

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## I. INTRODUCTION

Health care reform was one of the most controversial topics of 2010. In March, the United States House of Representatives signed off on a sweeping Senate health care reform package intended not only to provide health coverage to millions of uninsured Americans, but also to reduce the federal budget by nearly \$150 billion over the next ten years.<sup>1</sup>

Health care debate on the national level largely overshadowed an equally contentious issue at home: for the third time in the last thirty-five years, the Illinois Supreme Court struck down compensatory damage caps with its decision in *Lebron v. Gottlieb Memorial Hospital*.<sup>2</sup> The cap struck down in *Lebron* placed a limit on the recovery of noneconomic damages in a medical malpractice action: \$1,000,000 from hospitals and \$500,000 from physicians.<sup>3</sup> This cap was part of Public Act 94-677, a package of legislation designed to combat a so-called “health care crisis.”<sup>4</sup> The preamble to the statute sets out the dual evils the legislature sought to address: the increasing cost of medical liability insurance and a reduction in the availability of medical care.<sup>5</sup> This Comment will examine previous attempts at capping damages in Illinois and how the Illinois Supreme Court has responded. It will also analyze *Lebron* and the statute it struck down, Public Act 94-677.<sup>6</sup> This Comment will then review whether caps on compensatory damages truly effectuate the stated goals of decreasing the

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\* J.D. Candidate, Southern Illinois University School of Law, May 2011. I would like to thank my family and friends for their support and encouragement, especially my parents, Scott and Cissie. I would also like to thank Molly Dearing for her comments and guidance.

1. Robert Pear & David M. Herszenhorn, *Congress Sends White House Landmark Health Overhaul*, N.Y. TIMES, Mar. 22, 2010, at A1.

2. *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895 (Ill. 2010).

3. Act of May 30, 2005, Pub. Act 94-677, 2005 Ill. Laws 4964, *invalidated by Lebron*, 930 N.E.2d 895.

4. *Id.*

5. *Id.* at 4965.

6. *Id.*

cost of medical malpractice insurance and increasing the availability of medical care. Finally, this Comment will review a number of alternatives to damage caps that would more efficiently achieve those goals without unfairly depriving severely injured plaintiffs of the ability to be made whole by the civil tort system.

## II. BACKGROUND

Illinois has been a hotbed of debate over tort reform for decades. The General Assembly has repeatedly attempted to adopt sweeping tort reform packages, only to have these reforms invalidated by the Illinois Supreme Court. Damage caps like the one at issue in *Lebron* have been central to a number of prior attempts at tort reform in Illinois.

### A. 1975—*Wright v. Central Du Page Hospital Association*

Illinois's first attempt to impose damage caps was in 1975.<sup>7</sup> Public Act 79-960 limited the maximum recovery on medical malpractice injuries to \$500,000.<sup>8</sup> The following year, in *Wright v. Central Du Page Hospital Association*, the Illinois Supreme Court found such a cap to be unconstitutional.<sup>9</sup> The arguments made in *Wright* would echo throughout legislative efforts and court cases dealing with tort reform in Illinois for the next thirty-five years.

In *Wright*, the plaintiff argued that a hard cap of \$500,000 arbitrarily classified victims of medical malpractice into two camps: those that only suffered minor injuries, who presumably would not suffer damages in excess of \$500,000, and those who were severely injured and would require damages in excess of \$500,000 to be made whole.<sup>10</sup> The plaintiff reasoned that the cap unreasonably discriminated against those most severely injured in violation of the special legislation proviso contained within section thirteen of Article IV of the Illinois Constitution.<sup>11</sup>

The defendants conceded that the statute created unequal treatment, but that it was necessary to deal with a "medical malpractice crisis."<sup>12</sup> They noted prior cases where the judiciary upheld legislation that limited recovery for damage. However, the court distinguished these cases on the grounds that they dealt with a legislatively created cause of action, rather

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7. Act of Sept. 12, 1975, Pub. Act 79-960, 1975 Ill. Laws 2888, *invalidated by Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736 (Ill. 1976).

8. *Id.*

9. *Wright*, 347 N.E.2d at 741.

10. *Id.*

11. *Id.*

12. *Id.*

than one that had existed at common law.<sup>13</sup> The court noted that medical malpractice existed at common law, even citing a case from 1860 in which Abraham Lincoln defended a physician in a malpractice case.<sup>14</sup> In cases where the legislature had created the cause of action, it was entitled to limit the amount of damages recoverable because “it created both the right and the remedy, and . . . its power to limit the maximum recovery in the action that it created can not [sic] be questioned.”<sup>15</sup>

The defendants also cited the Workers’ Compensation Act to show precedent for the limitation of an award for injuries.<sup>16</sup> The court recognized that, in certain situations, the legislature may exercise its police power to modify the common law for the promotion of the general welfare.<sup>17</sup> The court had “never considered one to have such a vested right in the common-law rules governing negligence actions as to preclude the legislature from substituting a statutory remedy of this type for the common-law remedy.”<sup>18</sup> However, the court spoke in terms of a societal *quid pro quo*: under the workers’ compensation statute, an employer sacrificed common law negligence defenses and was held to a form of strict liability while the employee gave up the right to recover certain elements of common law damages in order to avoid proving negligence on the part of the employer.<sup>19</sup> The *Wright* court rejected this analogue, noting that the statute imposing the \$500,000 cap abolished no common law defenses on the part of the doctor or hospital, nor did it lessen the plaintiff’s burden of proof in a medical malpractice action.<sup>20</sup>

The court ultimately found the damages cap to be a form of special legislation which violated section thirteen of Article IV of the Illinois Constitution because it arbitrarily discriminated against those most severely injured by medical malpractice.<sup>21</sup> In its holding, however, the court left the door open to future legislation when it stated “we do not hold or even imply that under no circumstances may the General Assembly abolish a common law cause of action without a concomitant *Quid pro quo*.”<sup>22</sup> Twenty years later, the General Assembly would try to kick that door wide open with one of the most comprehensive tort reform packages ever conceived: Public Act 89-7, also known as the Civil Justice Reform Amendments of 1995.<sup>23</sup>

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13. *Id.* at 742.

14. *Id.* at 742 (citing *Ritchey v. West*, 23 Ill. 329 (1860)).

15. *Wright*, 347 N.E.2d at 742 (Ill. 1976) (quoting *Hall v. Gillins*, 147 N.E.2d 352, 354 (Ill. 1958)).

16. *Id.*

17. *Id.* (quoting *Moushon v. Nat’l Garages Inc.*, 137 N.E.2d 842, 845 (Ill. 1956)).

18. *Id.*

19. *Id.* at 742.

20. *Id.*

21. *Id.* at 743.

22. *Id.*

23. Civil Justice Reform Amendments of 1995, Pub. Act 89-7, 1995 Ill. Laws 284 (repealed 1997).

B. Civil Justice Reform Amendments 1995 and *Best v. Taylor Machine Works*

The Civil Justice Reform Amendments of 1995 made wholesale changes to tort law in Illinois. The act affected almost all areas of tort law, including premises liability, products liability, joint and several liability, medical malpractice and, of course, caps on damages awards.<sup>24</sup> The preamble of the act articulates the legislature's concerns with the tort system at the time, such as its effects on the creation and retention of jobs and the availability and cost of health care.<sup>25</sup> A large portion of the preamble is spent discussing the woes of noneconomic damage awards, the reasons for limitations, and the success that other states have had in doing so.<sup>26</sup>

The act tightened existing laws by creating "gate-keeper" procedural devices such as certificates of merit for product liability and medical malpractice causes of action.<sup>27</sup> It also altered numerous procedural devices such as jury instructions, itemized verdicts, the discovery process, depositions, statutory definitions and presumptions.<sup>28</sup> Some of the more radical changes included abolishing the joint and several liability system and replacing it with only a several liability system.<sup>29</sup> These changes were largely pro-defendant alterations intended to protect businesses and reduce the costs associated with doing business in Illinois.

The crown jewel of the act was a \$500,000 per plaintiff cap on the recovery of noneconomic damages for "all common law, statutory or other actions that seek damages on account of death, bodily injury, or physical damage to property based on negligence, or product liability based on any theory or doctrine."<sup>30</sup> It also limited punitive damages to three times the total economic damages awarded.<sup>31</sup> Unsurprisingly, the act was challenged two years later in *Best v. Taylor Machine Works*, where the Illinois Supreme Court invalidated the act in its entirety. The decision was based in part on the unconstitutionality of the \$500,000 noneconomic damages cap.<sup>32</sup>

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24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* See *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1063 (Ill. 1997) ("There is also no dispute that the heart of Public Act 89-7 is the \$500,000 limit on compensatory damages for injuries that are considered 'non-economic' in nature." (citation omitted)).

31. 1995 Ill. Laws 284.

32. *Best*, 689 N.E.2d at 1057.

*Best* is actually the consolidation of two different cases.<sup>33</sup> Vernon Best sued numerous defendants, including Taylor Machine Works, on a products liability theory after he was injured while operating a forklift for his employer.<sup>34</sup> The estate of Steven Kelso sued under the Wrongful Death Act, also modified by Public Act 89-7, as well as two other statutory causes of action after he was killed by a train at a railroad crossing.<sup>35</sup> The circuit court of Madison County consolidated the two cases after the plaintiffs in both cases sought declaratory and injunctive relief declaring that Public Act 89-7 was unconstitutional.<sup>36</sup> The court granted partial summary judgment for the plaintiff and the defendant appealed directly to the Illinois Supreme Court.<sup>37</sup>

The *Best* court devoted a substantial number of pages to detail facts that the circuit court relied on in making its decision, all the while cautioning that it could only consider the constitutionality of the statute, not its wisdom.<sup>38</sup> The court took notice that the house bill that ultimately became Public Act 89-7 was originally introduced as a bill to make a single technical change in the product liability statute—the changing of the word “any” to “a.”<sup>39</sup> Months later, the bill was released to the full members of the house as a sixty-seven page document that contained the full text of what became the act.<sup>40</sup> Shortly thereafter, the Senate, without significant debate, adopted the bill.<sup>41</sup> After taking notice of the bill’s track through the General Assembly, the court cautioned that “the manner in which Public Act 89-7 was passed is not dispositive of the merits of the constitutional challenges raised.”<sup>42</sup>

The court also took notice of the plaintiff’s production of empirical evidence to rebut the legislative findings contained in the preamble of the act.<sup>43</sup> As outlined above, the preamble laid out extensive findings of the act, such as how a noneconomic cap would improve health care in rural Illinois; how health care costs have decreased in other states with caps; how noneconomic losses do not have a monetary dimension and are, as such,

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33. *Id.* at 1064.

34. *Id.*

35. *Id.*

36. *Id.* at 1065.

37. *Id.* The trial court found that fifteen specific provisions of the act were unconstitutional, thus rendering the act as a whole unconstitutional. *Id.* The defendants appealed under Supreme Court Rule 302(a) which authorizes such an appeal whenever an Illinois statute has been held invalid. *Id.* (citing ILL. SUP. CT. R. 302(a)).

38. *Id.* at 1063.

39. *Id.* at 1065.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 1067.

difficult to quantify monetarily; and how noneconomic awards are arbitrarily awarded.<sup>44</sup> The purposes of the act were also summarized: to reduce health care costs, to increase accessibility to health care, to promote consistency in damage awards, to improve the credibility of the civil system, to establish guidelines for noneconomic damages, to decrease civil justice costs, and to ensure the affordability of insurance.<sup>45</sup>

To rebut these claims, plaintiffs produced affidavits from a number of expert witnesses and studies.<sup>46</sup> The evidence was introduced to show that the findings were incorrectly based on anecdotal evidence, such as the McDonald's spilled coffee case,<sup>47</sup> that businesses, rather than personal injury plaintiffs, were the most active litigants in the state;<sup>48</sup> and that the findings had no empirical basis or were based on unreliable data.<sup>49</sup> Once again, after having examined in significant detail the various types of evidence submitted to the circuit court, the *Best* court stated that it was not empowered to use that evidence to adjudicate the accuracy of legislative findings.<sup>50</sup>

The court then examined the act, and in particular the damages cap, under two constitutional theories: the special legislation prohibition found in the Illinois constitution and a separation of powers analysis.<sup>51</sup>

### 1. *Special Legislation Analysis*

The special legislation prohibition is found in article IV, section thirteen of the Illinois Constitution, which provides: "The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination."<sup>52</sup>

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44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* The court noted that the legislative debates frequently discussed this case as an example of the problem with the tort system in Illinois. *Id.* An elderly woman received a \$2.9 million punitive damage verdict in that case. *Id.* However, the court notes that reliance on such anecdotal evidence is erroneous because (1) that was a punitive award, rather than a noneconomic award and (2) the amount was reduced by the court to \$480,000. *Id.* n.1.

48. *Id.* at 1068.

49. *Id.* Neil Vidmar, a professor of Social Science and Law at Duke Law School noted that in Indiana, a state with damage caps, medical malpractice claims increased rather than decreased. *Id.* Marc Galanter, a professor of Law at the University of Wisconsin Law School noted that between 1980 and 1994, claims in Cook County declined without any cap on noneconomic damages. *Id.*

50. *Id.* at 1069.

51. *Id.*

52. ILL. CONST. art. IV, § 13.

The court explained that this provision has historically limited the lawmaking power of the General Assembly by prohibiting statutes that create a special benefit to a class of people while excluding others who are similarly situated.<sup>53</sup> In other words, the legislature cannot create arbitrary classifications that discriminate without a rational basis.<sup>54</sup> The special legislation analysis is largely the same as an equal protection analysis: the “statutory classification [must be] rationally related to a legitimate State interest.”<sup>55</sup> In order to survive this test, the classifications created by Public Act 89-7 must have been “based upon reasonable differences in kind or situation, and . . . the basis for the classifications [must have been] sufficiently related to the evil to be obviated by the statute.”<sup>56</sup>

The court proceeded to examine a number of cases in which it had previously upheld a statute against a special legislation challenge or pronounced the statute unconstitutional.<sup>57</sup> Plaintiffs relied primarily on three cases where the statute in question had been found unconstitutional under a special legislation analysis: *Wright v. Central Du Page Hospital Association*,<sup>58</sup> *Grace v. Howlett*,<sup>59</sup> and *Grasse v. Dealer’s Transport Co.*<sup>60</sup> The defendants argued that *Anderson v. Wagner* limited the application of those three cases.<sup>61</sup> The court, however, rejected this argument because *Anderson* did not specifically deal with whether the General Assembly had the authority to place a limit on compensatory damages.<sup>62</sup>

The court determined that there were three arbitrary classifications created by Public Act 89-7: (1) a distinction between slightly and severely injured plaintiffs, (2) a distinction between plaintiffs with identical injuries, and (3) a distinction between types of injury.<sup>63</sup> The court provided three

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53. *Best*, 689 N.E.2d at 1070.

54. *Id.*

55. *Id.* at 1071 (quoting *In re* Petition of Vernon Hills, 658 N.E.2d 365, 365 (Ill. 1995)).

56. *Id.*

57. *Id.*

58. *See supra* Part II.A.

59. *Grace v. Howlett*, 283 N.E.2d 474 (Ill. 1972) (analyzing a statute that limited recovery for automobile accident victims was invalidated because distinction between commercial or personal automobile use was arbitrary).

60. *Grasse v. Dealer’s Transp. Co.*, 106 N.E.2d 124 (Ill. 1952) (holding that portion of workers’ compensation act invalidated because it created arbitrary distinction based on fortuity of whether a third party tortfeasor was also covered by workers’ compensation).

61. *Best*, 689 N.E.2d at 1074 (discussing *Anderson v. Wagner*, 402 N.E.2d 560 (Ill. 1979) (holding that legislation which provided special statute of limitations for medical malpractice was constitutional because it was a rational response to the judicial expansion of the discovery rule in medical malpractice cases)).

62. *Id.*

63. *Id.* at 1075.

hypotheticals to illustrate each of these arbitrary classifications and to explain how each failed to meet the rational basis test.<sup>64</sup>

First, to demonstrate the distinction between slightly and severely injured plaintiffs, the court assumed three plaintiffs were injured by the same defendant's negligence: Plaintiff A was injured moderately for a month, Plaintiff B was injured severely for a year, and Plaintiff C was drastically injured for the rest of her life.<sup>65</sup> A jury awards Plaintiffs A and B \$100,000 in noneconomic damages, while Plaintiff C is awarded \$1 million in noneconomic damages.<sup>66</sup> In such a situation, the act fails to address its stated purposes of consistency and rationality because Plaintiff A and Plaintiff B receive an equal award despite injuries of differing severity.<sup>67</sup> Plaintiff C's award is reduced automatically without regard to whether the reduction is reasonable, fair, or meets the factual criteria of the case.<sup>68</sup> In this regard, the court reasoned, the distinction is arbitrary and failed to meet the purposes set out in the act's preamble.<sup>69</sup>

Next, to demonstrate the second classification between individuals with identical injuries, the court assumed that Plaintiff lost his leg due to a defective forklift, then lost his other leg one year later due to the negligence of another tortfeasor.<sup>70</sup> It alternately assumed that Plaintiff lost both of his legs in the same negligent accident.<sup>71</sup> Each time, Plaintiff brought his suit against the responsible tortfeasors. The jury awarded \$400,000 per leg in noneconomic damages.<sup>72</sup> In the first instance, with the \$500,000 cap in place, Plaintiff would be able to be made whole and recover the full \$800,000 because the tort actions were against two different tortfeasors a year apart.<sup>73</sup> However, in the latter instance, the act would cap Plaintiff's recovery at \$500,000 without regard to the facts of the case, and he would not be made whole.<sup>74</sup>

Finally, to illustrate the arbitrary classification among types of injury, the court noted that the \$500,000 cap in the act applies only to claims involving death, bodily injury, or property damage but not to torts concerning invasion of privacy, defamation, intentional and negligent infliction of emotional distress, damage to reputation, and breach of

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64. *Id.* These hypotheticals were adopted from the plaintiffs' brief.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*



fiduciary duty.<sup>75</sup> This distinction was arbitrary because all of these torts include noneconomic damages as part of compensatory damages; the court found it no harder to assess noneconomic damages in tort actions involving death, bodily injury, or property damage than in these other tort actions.<sup>76</sup>

The defendants raised numerous arguments in opposition, such as the idea that noneconomic damages should not be monetarily compensable,<sup>77</sup> that the cap may be used as a “one step at a time” stopgap toward the goal of reducing the costs of the civil justice system,<sup>78</sup> that the legislature has the inherent authority to change the common law,<sup>79</sup> and that the cap was constitutional because numerous other jurisdictions had upheld a similar noneconomic damages cap.<sup>80</sup> After discussing and rejecting each of the defendants’ arguments, the court held that the \$500,000 cap in noneconomic damages offended the special legislation clause of the Illinois constitution and turned its analysis toward the separation of powers argument put forth by the plaintiffs.<sup>81</sup>

## 2. Separation of Powers Analysis

The court in *Best* also offered an alternative reason for finding the noneconomic damages caps unconstitutional. The court opined that a cap on damages violated the separation of powers because the cap acted as a legislative remittitur.<sup>82</sup>

The separation of powers doctrine provides that each of the three branches of government wields its own power that the other two have no right to intrude upon.<sup>83</sup> While it is possible that some of these powers overlap, the court felt that the remittitur doctrine was solely and inherently

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75. *Id.*

76. *Id.* at 1076.

77. *Id.* The court found this argument to be in contradiction to the definitions of noneconomic damages and compensatory damages found in the act, which showed that the “legislature believed that remuneration is an appropriate means by which to compensate tort victims for their noneconomic injuries.” *Id.*

78. *Id.* The court noted that the “one step” rationale cannot be used to support an arbitrary classification. *Id.* at 1077.

79. *Id.* at 1076. The court simply responded that the legislature does have the power to alter the common law, but those changes must be rationally related to a legitimate government interest; the court felt that the cap was arbitrary, and so was not rationally related. *Id.* at 1077.

80. *Id.* The court distinguished these cases, noting that the caps involved in the foreign statutes of varied scope and effect and the constitutional provisions by which the caps challenged were unique to each jurisdiction and of limited value in determining whether Illinois’s Public Act 98-7 violated the Illinois constitution. *Id.* at 1078.

81. *Id.*

82. *Id.*

83. *Id.* at 1079.

a power of the judicial branch.<sup>84</sup> The remittitur doctrine is a method by which a judge may reduce an excessive jury verdict.<sup>85</sup> The application of a remittitur is a fact intensive, case-by-case analysis; a remittitur can only be applied when the specific facts of that case demonstrate that no evidence could possibly support a jury verdict of the magnitude awarded.<sup>86</sup> The standard in Illinois is that remittitur may only be applied when a damage award “falls outside the range of fair and reasonable compensation or results from passion or prejudice, or if it is so large that it shocks the judicial conscience.”<sup>87</sup> The judiciary is the only branch of government in a position to adequately review the evidence of each case and pronounce whether a jury’s award was excessive.<sup>88</sup>

The *Best* court felt that such a legislative cap interfered with the inherent responsibility of the judiciary to examine and determine whether an award was excessive.<sup>89</sup> It deprived the court of considering whether a large damages award fit the evidence of a particular case, and “disregard[ed] the jury’s careful deliberative process in determining damages that will fairly compensate injured plaintiffs.”<sup>90</sup> The court also objected because the cap expanded the remittitur doctrine by operating automatically without a successful plaintiff’s consent, whereas a judicial remittitur required either a plaintiff’s consent or a new trial.<sup>91</sup>

Concluding that the damage caps were unconstitutional for the two reasons explained above, the court declined to consider whether the noneconomic damages cap violated the right to a jury trial and the right to a certain remedy.<sup>92</sup> The court struck down the act in its entirety.<sup>93</sup>

### 3. *Dissent*

The dissent, for its part, focused on the legislature’s “authority to determine public policy, to proscribe solutions to problems, and to alter the common law.”<sup>94</sup> Justice Miller criticized the majority for “substitut[ing] its

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84. *Id.*

85. *Id.*

86. *Id.* at 1080.

87. *Id.* (quoting *Richardson v. Chapman*, 676 N.E.2d 621, 628 (Ill. 1997)).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 1081.

93. *Id.* at 1106. Besides the cap, the court also examined numerous other provisions of Public Act 89-7 and found a number of them unconstitutional and unable to be severed from the act as the whole. *Id.*

94. *Id.* at 1107 (Miller, J., dissenting) .

own view of public policy for the legislature's considered judgment."<sup>95</sup> He noted that the majority's special legislation analysis was a significant departure from the traditional, deferential rational basis test.<sup>96</sup> He opined that the court had never before required such a stringent test, noting that legislative methods are not subject to courtroom fact-finding and need only be based on mere rational speculation that the methods will solve the particular evil feared.<sup>97</sup> Thus, under his analysis, tort reform was a legitimate governmental goal and imposing a limit on non-economic damages was rationally related to that goal.<sup>98</sup>

Justice Miller also criticized the majority's separation of powers analysis as mere dicta, as it had already made its decision based on special legislation grounds.<sup>99</sup> He briefly attacked the merits of the argument, stating: "[r]emittitur pertains to judges and juries, not the legislature; by characterizing the cap on damages as a remittitur, the majority is simply erecting and demolishing a strawman."<sup>100</sup>

### III. RECENT DEVELOPMENTS

In 2005, the legislature again responded to a "health care crisis" by enacting Public Act 94-677, a reform package with a number of changes intended to decrease medical malpractice premiums, to retain doctors, and to improve the quality of care.<sup>101</sup> Public Act 94-677 was the result of intense bargaining between hospitals, insurance companies, and trial lawyers and their representatives in the legislature.<sup>102</sup> The act contained a number of changes and additions intended to lower the cost of health care in Illinois, including more disclosure on the part of medical malpractice insurers,<sup>103</sup> an increase in the members of the Medical Discipline Board,<sup>104</sup> more medical investigators,<sup>105</sup> changes to the healing arts malpractice affidavit,<sup>106</sup> an apology law,<sup>107</sup> and a cap on noneconomic damages.<sup>108</sup> As

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95. *Id.*

96. *Id.*

97. *Id.* at 1108.

98. *Id.*

99. *Id.* at 1110.

100. *Id.*

101. Act of May 30, 2005, Pub. Act 94-677, 2005 Ill. Laws 4964, *invalidated by Lebron*, 930 N.E.2d 895.

102. Edward J. Kionka, *Things To Do (Or Not) To Address the Medical Malpractice Insurance Problem*, 26 N. ILL. U. L. REV. 469 (2006).

103. § 310, 2005 Ill. Laws at 4971.

104. § 315, 2005 Ill. Laws at 4974.

105. *Id.*

106. § 330, 2005 Ill. Laws at 4995.

part of the bargaining process, an inseverability clause was included, ensuring that if one section of the act fell, the entire act would be declared unconstitutional.<sup>109</sup>

A. 2010—*Lebron v. Gottlieb Memorial Hospital*

After *Wright* and *Best*, it was inevitable that any cap on noneconomic damages in Illinois would be challenged. *Lebron* was that case.<sup>110</sup> *Lebron* came to the Illinois Supreme Court as a declaratory judgment action to determine the plaintiffs' rights with respect to Public Act 94-677.<sup>111</sup> The plaintiff, Frances Lebron, alleged that she was admitted to Gottlieb Memorial Hospital on October 31, 2005, to give birth to her daughter, Abigaile.<sup>112</sup> Abigaile was delivered via Caesarean section, but Abigaile allegedly sustained injuries due to negligent care, including "severe brain injury, cerebral palsy, cognitive mental impairment, inability to be fed normally such that she must be fed by a gastronomy tube, and inability to develop normal neurological function."<sup>113</sup>

The plaintiffs moved for partial judgment on the pleadings based on the theory that the cap in Public Act 94-677 violated the separation of powers clause of the Illinois Constitution and was improper special legislation.<sup>114</sup> The plaintiffs also alleged the cap violated the rights of trial by jury, due process, equal protection, and a certain and complete remedy.<sup>115</sup> The circuit court of Cook County determined that the cap on noneconomic damages violated the separation of powers clause and, because of the inseverability clause in the act, declared Public Act 94-677 void in its entirety.<sup>116</sup> The circuit court also specifically found the case had standing and was ripe for adjudication "given the catastrophic nature of the injuries pled."<sup>117</sup> The court decided the issue only on a separation of powers analysis, not reaching any of the plaintiffs' other claims.<sup>118</sup> Because this was a case dealing with the constitutionality of an Illinois statute, the

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107. § 330, 2005 Ill. Laws at 5001 ("[A]ny expression of grief, apology, or explanation provided by a health care provider . . . that is provided within 72 hours of when the provider knew or should have known [about the error] shall not be admissible as evidence . . .").

108. § 330, 2005 Ill. Laws at 5000.

109. § 995, 2005 Ill. Laws at 5005.

110. *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895 (Ill. 2010).

111. *Id.*

112. *Id.* Abigaile is also a plaintiff. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Lebron v. Gottlieb Mem'l Hosp.*, No. 2006 L 12109, 2007 WL 3390918, at \*1 (Ill. Cir. 2007).

117. *Id.*

118. *Id.*

defendants were allowed a direct appeal to the Illinois Supreme Court pursuant to Supreme Court Rule 302(a).<sup>119</sup>

As part of its analysis section, the Court engaged in a detailed regurgitation of the reasoning found in *Best*, including both the special legislation analysis and the separation of powers analysis.<sup>120</sup> After briefly rejecting the defendants' contention that the separation of powers argument found in *Best* was *dicta* and entitled to little precedential value,<sup>121</sup> the Court moved on to the heart of the case: whether it would uphold the *Best* constitutional analysis with regard to noneconomic damage caps, or distinguish the caps at issue from those in *Best* because they were narrowly-tailored to address the modern "health care crisis."<sup>122</sup>

The court chose to uphold *Best*, stating that "the encroachment upon the inherent power of the judiciary is the same in the instant case as it was in *Best*."<sup>123</sup> The court made it clear that it was not concerned with the special legislation analysis, rejecting the defendants' arguments that the noneconomic damage caps were not arbitrary, were rationally related to a legitimate government interest, and did not unfairly burden one class of plaintiffs over another.<sup>124</sup> The court was concerned solely with "whether the legislature, through its adoption of the damages cap, is exercising powers properly belonging to the judiciary."<sup>125</sup>

The defendants put forth a number of additional arguments, all of which were unavailing.<sup>126</sup> The court narrowly focused on the single question of whether or not the legislature could cap compensatory,

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119. *Lebron*, 930 N.E.2d at 901 (citing ILL. SUP. CT. R. 302(a)).

120. *Id.* at 903.

121. *Id.* The court provided an interesting explanation of the two types of dicta, *obiter dictum* and judicial *dictum*. *Id.* at 907. *Obiter dictum* is a "remark or opinion that a court uttered as an aside" and is not integral to the opinion, and thus not binding authority. *Id.* Judicial *dictum*, however, is "an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court . . . and should be followed unless found to be erroneous." *Id.* (quoting *Excelon Corp. v. Dep't of Revenue*, 917 N.E.2d 899, 907 (Ill. 2009)). The court concluded that the *dicta* in *Best* was judicial *dictum* and should be given its due authority. *Id.*

122. *Id.*

123. *Id.* at 908.

124. *Id.*

125. *Id.*

126. The court rejected the familiar "caps are just one part of a 'multidimensional' response to the health care crisis" argument, noting that the court has previously struck down aspects of a "multidimensional" response in *Wright*. *Id.* at 909. The defendants also tried to analogize the caps to Section 2-1117 of the Illinois Code, which modified joint and several liability such that only those defendants 25 percent or more at fault were jointly liable, all others being liable only for their portion of fault. *Id.* at 910 (citing *Unzicker v. Kraft Food Ingredients Corp.*, 783 N.E.2d 1024 (Ill. 2002)). In *Unzicker*, the court rejected an attack on this section on separation of powers grounds, noting that there was no absolute cap on the total amount a plaintiff could recover. *Id.* The caps in Public Act 94-677 clearly did exactly that. *Id.*

noneconomic damages to a predetermined level.<sup>127</sup> Like in *Best*, the court declined to consider similarities between other Illinois statutes and their constitutionality under this analysis,<sup>128</sup> nor did it consider malpractice caps in other states.<sup>129</sup> Deferring entirely to the separation of powers analysis in *Best* and finding no persuasive arguments on behalf of the defendants' position, the court upheld the circuit court's finding of unconstitutionality.<sup>130</sup>

The dissent by Justice Karmeier was clearly fashioned toward the wisdom and desirability of the act, rather than its constitutionality.<sup>131</sup> He began by drawing analogies to the Obama health care reform platform, which, in its final form, does not include any type of federal damages cap, and proceeded to give a detailed explanation of the other features of Public Act 94-677.<sup>132</sup> Justice Karmeier went on to provide a number of reasons that the majority incorrectly decided the case: the legislature has ultimate authority over matters of public policy and this was one such case,<sup>133</sup> the

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127. *Lebron* 930 N.E.2d at 912. The court specifically distinguished a case rejecting the separation of powers analysis in the context of punitive damages. *Id.* (quoting *Smith v. Hill*, 147 N.E.2d 321 (Ill. 1958). "The act in barring punitive damages merely establishes a 'public policy' that in the interest of society . . . such damages should not be awarded . . . [because punitive damages operate in the interest of society,] not to recompense solely the individual, to deny them cannot be said to deny any constitutional right or to encroach upon any judicial function. . . ." *Smith*, 147 N.E.2d at 327.

128. Curiously, the court noted that the Illinois Innkeeper Protection Act did cap a hotel's liability for damages, but such a cap was acceptable because the statute allowed for contracting around the limit. *Lebron*, 930 N.E.2d, at 913 (citing 740 ILL. COMP. STAT. 90/1 (2005)). The act limits responsibility on the part of the hotel, regardless of negligence, to a statutory amount "unless the manager or proprietor of such hotel has contracted by a separate agreement in writing to assume a greater liability." 90/3.1, 90/3.2. Could the simplest solution to achieving acceptable caps be similar language with regard to hospital care? If adequate notice is given, "neither the hospital nor the doctor is liable for noneconomic damages due to the care received in any sum exceeding \$500,000, regardless of whether such loss or damage is occasioned by the fault or negligence of such hospital or doctor or his agents or employees, or otherwise, unless the hospital or doctor has contracted by a separate agreement in writing to assume a greater liability." *See* 90/3.1. Such language would give insurers the stability of judgments sought and would remove the cap from impermissible judicial infringement and place it in the realm of contracts.

129. *Lebron*, 930 N.E.2d, at 914 ("That 'everybody is doing it' is hardly a litmus test for the constitutionality of the statute.")

130. *Id.*

131. *Id.* at 917 (Karmeier, J., dissenting).

132. *Id.* at 917-18.

133. *Id.* at 920-21.

court lacked jurisdiction over the matter,<sup>134</sup> and the plaintiffs lacked standing such that the issue was unreviewable.<sup>135</sup>

At the heart of Justice Karmeier's dissent was his rejection of *Best* and what it stands for. First, he stated that remittitur is not an explicit constitutional doctrine, noting that other states' legislatures have abolished the doctrine.<sup>136</sup> Next, he objected to the *Best* court characterizing noneconomic caps as a legislative remittitur, claiming instead that the court was merely carrying out the will of the legislature as a matter of public policy and law.<sup>137</sup> For his part, he cited numerous cases from other jurisdictions supporting this argument.<sup>138</sup> Finally, Justice Karmeier believed that the legislature's ability to make, amend, or alter the common law took precedence over any separation of powers issues.<sup>139</sup> He once more examined the prospective wisdom behind the enactment of Public Act 94-677, concluding that "the potential for unlimited awards of such damages will imperil the availability of medical care to the population as a whole."<sup>140</sup>

#### IV. ANALYSIS

Whether one agrees with the constitutional analysis in *Wright*, *Best*, and *Lebron* or vehemently adheres to the dissenting viewpoint, these cases speak definitively on the issue: caps on compensatory damages are out of the question in Illinois. State supreme courts are the final arbiters of state constitutions; the United States Supreme Court cannot review *Lebron*.<sup>141</sup> Nothing short of amending the Illinois Constitution will change Illinois' stance on damage caps. While some may lament the fall of caps on compensatory damages, this Comment will argue why caps on economic damages are not desirable. Instead, there are other remedial measures that can curtail the excessive costs to health care providers in Illinois, such as

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134. *Id.* at 921–22. Justice Karmeier argues that, because the merits of this case have yet to be reached, there is no basis for finding that the decision could not be based on an alternate, non-constitutional basis, a requirement to declaring a statute unconstitutional. *Id.* at 922. He notes that, at trial on the merits, the defendants could prevail or the jury could award less than \$500,000, thus not invoking the cap. *Id.*

135. *Id.* at 926.

136. *Id.* at 928. The state of Missouri abolished the doctrine in 1985. *Id.* (citing *Firestone v. Crown Ctr. Redevelopment Corp.*, 693 S.W.2d 99, 110 (Mo. 1985).

137. *Id.*

138. *Id.* at 928–29.

139. *Id.* at 930.

140. *Id.* at 933.

141. Jason A. Parson, Note, *Medical Malpractice Damage Caps: Navigating the Safe Harbors*, 65 WASH. U. L.Q. 565, 567 (1987) ("So long as the courts interpret state laws as offering greater protection than the federal Constitution, their decisions concerning equal protection and due process are not reviewable even by the Supreme Court.").

reenacting the insurance regulation and apology law aspects of Public Act 94-677 and creating a patient compensation fund.

#### A. Damage Caps Do Not Significantly Correlate to a Reduction in Insurance Premiums

The logic behind legislative caps on compensatory damages has always been that a hard ceiling on a potential payout by the malpractice insurer will cause that insurer to lower their premiums.<sup>142</sup> The theory goes something like this: because insurance is essentially a form of institutionalized gambling, limiting the potential payout through a damages cap will significantly reduce the financial risk to the insurer, and, in turn, the amount of money the insured health care providers are forced to pay to the insurer will also be reduced.<sup>143</sup> Socially, lower premiums are desirable because health care providers are more likely to move into the state and stay once they are here.<sup>144</sup> Thus, damage caps ultimately increase the quality of health care available to a given state's citizens.<sup>145</sup>

However, this theory simply does not line up with casual observation or empirical studies. States such as Missouri and Texas have actually experienced an *increase* in premiums, despite enacting noneconomic damage caps.<sup>146</sup> California, Colorado and Montana have damage caps of \$250,000, half of what the cap in Illinois was under Public Act 94-677, and still their median payments for noneconomic damages rose by 53 percent, 31 percent, and 169 percent, respectively, between 1997 and 2003.<sup>147</sup> Studies suggest that between 1991 and 2002, malpractice premiums rose at a rate twelve percent higher in states *with* damage caps than those without.<sup>148</sup>

Similarly, doctors do not appear to base their choice of where to practice on whether or not a state has a cap on noneconomic damages. A study in 2005 concluded that "increases in premiums do not seem to have an effect on the total number of physicians in each state."<sup>149</sup> While premiums do have an exaggerated effect on older, rural doctors, the 2005

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142. Nancy L. Zisk, *The Limitations of Legislatively Imposed Damages Caps: Proposing A Better Way to Control the Costs of Medical Malpractice*, 30 SEATTLE U. L. REV. 119, 120 (2006).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 142-43.

147. Adam G. Winters, Comment, *Where There's Smoke, Is There Fire? An Empirical Analysis of the Tort "Crisis" In Illinois*, 56 DEPAUL L. REV 1347, 1376-77 (2007).

148. *Id.* at 1378.

149. Katherine Baicker & Amitabh Chandra, *Defensive Medicine and Disappearing Doctors?*, REGULATION, Fall 2005, at 24, 29, available at <http://www.cato.org/pubs/regulation/regv28n3/v28n3-4.pdf>.



study suggests “state-level tort reform is unlikely to affect the practice of medicine by averting local physician shortages.”<sup>150</sup> Dr. Neil Vidmar, the professor whose research informed the Illinois Supreme Court’s decision in *Best*, conducted a study in 2003 to see if physicians were fleeing Illinois.<sup>151</sup> His findings showed that from 1993 to 2003, the number of doctors in Illinois increased by 5,750, to a total of 30,264.<sup>152</sup> In terms of “at-risk” specialties, in the same time period, the number of gynecologists rose from 1,596 to 1,814 and the number of neurosurgeons rose from 191 to 212.<sup>153</sup> There simply is no mass exodus of doctors that proponents of damages cap frequently allude to.

Even insurance companies are not convinced damage caps actually lead to a reduction in premiums. Medical malpractice insurers such as Farmers Insurance Group recently stopped writing policies in a number of states, most of which had long-standing damage caps.<sup>154</sup> In Illinois, after Public Act 94-677 was passed, ISMIE (the largest malpractice insurer in the state) raised its rates by twenty percent and refused to say when or if premiums would decrease as a result of the damages cap.<sup>155</sup> Instead, there are other reasons for the premium spikes that cannot be addressed by capping damages.

The President and CEO of AIG once quipped that “the industry’s problems were due to price cuts taken ‘to the point of absurdity’ in the early 1980s.”<sup>156</sup> What he was referring to was the widely acknowledged cyclical nature of the insurance industry.<sup>157</sup>

The insurance market goes through “hard” and “soft” markets.<sup>158</sup> A “soft” market means that premiums are low, rates are stable, and there is a great deal of competition between insurance companies.<sup>159</sup> Insurance companies use this market to cut premiums to attract policyholders and insure otherwise risky doctors in order to generate investment capital.<sup>160</sup> A “hard” market, on the other hand, means that premiums rise and fewer

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150. *Id.* at 31.

151. Frank Perrecone & Lisa Fabiano, *The Fleecing of Seriously Injured Medical Malpractice Victims in Illinois*, 26 N. ILL. U. L. REV. 527, 540 (2006).

152. *Id.*

153. *Id.* at 541.

154. Winters, *supra* note 147, at 1377.

155. Perrecone, *supra* note 151, at 543.

156. Zisk, *supra* note 142, at 143.

157. Cathleen B. Tumulty, Note, *Capping Non-Economic Damages: Is It Really What the Doctor Ordered? Predicting the Effect of Federal Tort Reform By Examining the Impact of Tort Reform at the State Level*, 39 SUFFOLK U. L. REV. 817, 821 (2006).

158. *Id.*

159. *Id.*

160. Perrecone, *supra* note 151, at 544.

insurance companies offer coverage in the market.<sup>161</sup> Hard markets are usually in response to declining interest rates and underperforming capital investment.<sup>162</sup> Hard markets cycle through approximately every ten years and earn the “medical malpractice crisis” moniker.<sup>163</sup> These cyclical markets are largely responsible for the spikes in malpractice premiums; not unsurprisingly, this is why caps on damage awards have little to no effect on the reduction of insurance premiums.<sup>164</sup>

A 2003 study by the United States General Accounting office suggests that incomplete information and improper rate making by insurance companies lead to these soft and hard markets.<sup>165</sup> If this is so, this Comment proposes a number of suggestions to bring stability to the medical malpractice industry: re-enact the provisions of Public Act 94-677 that required increased transparency and regulation on the part of malpractice insurers, re-enact the act’s apology law, and institute a state-run patient compensation fund.

#### B. Re-enact the Provisions of Public Act 94-677 That Dealt with Malpractice Insurance Regulation

Public Act 94-677 required increased transparency on the part of malpractice insurers and gave the state greater regulatory control over their rates. It called for public hearings on rate increases if requested by either an insurer’s clients or the Secretary of Financial and Professional Regulation.<sup>166</sup> It also mandated such a hearing if the insurer sought a rate increase greater than six percent.<sup>167</sup> The Secretary could request additional information at these hearings, and all actuarial data must have been made available to the public.<sup>168</sup> If no justification existed for such an increase, the Secretary was authorized to impose a \$1000 penalty for each day until the increase was reversed.<sup>169</sup> The first hearing under this statute led the director of the Illinois Department of Insurance to order ISMIE to freeze its rates or reduce them by three and a half percent.<sup>170</sup> This type of information, when made available to the public and other insurance

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161. Tumulty, *supra* note 157, at 821.

162. Perrecone, *supra* note 151, at 544.

163. *Id.*

164. *Id.* at 545.

165. U.S. GEN. ACCOUNTING OFFICE, GAO-03-702, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES 44 (2003).

166. Act of May 30, 2005, Pub. Act 94-677, § 310, 2005 Ill. Laws 4964, 4965, *invalidated by* Lebron, 930 N.E.2d 895.

167. *Id.*

168. *Id.*

169. *Id.*

170. Kionka, *supra* note 102, at 505.

companies, enhances market competition and acts to drive premiums down.<sup>171</sup>

In addition to transparency, Illinois should go further to actively regulate the rates carriers charge. California is credited as having one of the best systems for controlling the spiraling cost of medical malpractice with its Medical Injury Compensation Reform Act (MICRA), which placed a hard cap of \$250,000 on noneconomic damages.<sup>172</sup> However, insurance premiums actually increased after the legislation was passed.<sup>173</sup> Rates only began to decrease after the citizens of California enacted Proposition 103, which required insurers to reduce their rates up to twenty percent and allowed consumers to challenge proposed rate increases.<sup>174</sup> Rates immediately decreased and have since risen only with inflation.<sup>175</sup> Insurers also refunded approximately \$135,000,000 to health care providers by 1995.<sup>176</sup>

Illinois is sorely in need of increased rate regulation. Illinois has tracked medical malpractice premiums and losses from 2000 through 2008. In those nine years the highest “losses paid”<sup>177</sup> amount was \$483,428,127 in 2002; the average amount paid out in those nine years was \$368,052,350.<sup>178</sup> From 2002 onward, the lowest amount of premiums collected from insurers in Illinois was \$460,246,839; the average collected during the nine-year period was \$508,955,351.<sup>179</sup> Medical malpractice insurance companies in Illinois charged, on average, \$140,903,001 more than they paid out in claims each year over the nine-year period from 2000 until 2008, with that gap increasing dramatically after Public Act 94-677 and its damages cap.<sup>180</sup>

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171. ILL. TRIAL LAWYERS ASS'N, THE WHOLE TRUTH ABOUT MEDICAL MALPRACTICE AND INSURANCE 19 (Feb. 2010), available at [http://www.iltla.com/pdf/WhitePaper\\_TheWholeTruth\\_Feb2010.pdf](http://www.iltla.com/pdf/WhitePaper_TheWholeTruth_Feb2010.pdf) (“The positive effect of the insurance market reforms has been noted by no less an authority than Michael McRaith, Director of the Illinois Department of Insurance, who explained: ‘For the first time in the history of the state, [malpractice] insurance companies that want to compete for business in Illinois have access to actuarial information and loss and claims data . . . . We see more companies coming in and a stabilization or decline in actual rates.’ Director McRaith added ‘[m]ore companies are looking at Illinois as a viable marketplace because of the availability of this data.’”).

172. Perrecone, *supra* note 151, at 545.

173. *Id.*

174. *Id.* at 546.

175. Winters, *supra* note 147, at 1382.

176. Perrecone, *supra* note 151, at 546.

177. Losses paid is the amount an insurer actually pays out in a given year, irrespective of the year in which the claim being paid out occurred. (U.S. GEN. ACCOUNTING OFFICE, *supra* note 165, at 16.)

178. *Market Share Reports*, ILL. DEP'T OF INSURANCE, available at <http://www.insurance.illinois.gov/medmal/> (last visited Apr. 11, 2011).

179. *Id.*

180. *Id.*

“Incurred loss ratio” is another metric used to measure the profitability of an insurance company.<sup>181</sup> A number above 100 indicates faltering profitability, as more is being paid out than is being collected in premiums.<sup>182</sup> This ratio paints a clear picture: from 2000 until 2005, when Public Act 94-677 was passed with its cap on damages, the average loss ratio for Illinois malpractice insurers was 107.44.<sup>183</sup> After 2005, the average loss ratio was a mere 43.16.<sup>184</sup> Medical malpractice insurers in Illinois have used the latest “medical malpractice crisis” to gouge health care providers with outrageous premiums in order to more than double their profitability. The state must step in to limit this kind of price gouging through greater regulation.

### C. Re-enact an Apology Law

Apologies are a relatively new weapon in the arsenal to reduce the number of medical malpractice claims. Apologies are admittedly unintuitive to most lawyers. The traditional way of thinking suggests that apologizing is just another way of admitting fault.<sup>185</sup> However, studies suggest that apologies can actually reduce the number of lawsuits filed in the medical malpractice arena.<sup>186</sup> Studies also suggest that even if suits are filed, apologies make patients more inclined to accept settlement offers<sup>187</sup> and can have an effect on judges and juries even when litigation proceeds to trial.<sup>188</sup>

While still being studied, encouraging apologies is yet another piece of the puzzle in reducing the cost of the health care system in Illinois. Public Act 94-677 included a piece of legislation that encouraged doctors to apologize to wronged patients by barring evidence of that apology in court.<sup>189</sup> The apology law in Public Act 94-677 barred evidence of “any expression of grief, apology, or explanation provided by a health care provider” if it was offered within 72 hours of when the provider knew or should have known of the unfortunate outcome.<sup>190</sup> The legislature should

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181. U.S. GEN. ACCOUNTING OFFICE, *supra* note 165, at 29.

182. *Id.*

183. ILL. DEPARTMENT OF INSURANCE, *supra* note 178.

184. *Id.*

185. Jonathan Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1028 (1999).

186. Robin Ebert, Comment, *Attorneys, Tell your Clients to Say They're Sorry: Apologies in the Health Care Industry*, 5 IND. HEALTH L. REV. 337, 352 (2008).

187. *Id.*

188. *Id.* at 351.

189. *Id.* at 346.

190. Act of May 30, 2005, Pub. Act 94-677, § 330, 2005 Ill. Laws 4964, 5000, *invalidated by* Lebron, 930 N.E.2d 895.

also reenact this feature of Public Act 94-677 as a way to combat the number of malpractice claims filed in Illinois.

#### D. State-Sponsored Patient Compensation Funds

One new idea for Illinois is that of a state-operated patient compensation fund. Patient compensation funds have been created as a tool to combat the instability and uncertainty surrounding privatized medical malpractice insurance.<sup>191</sup> Theoretically, these funds remove instability and thus reduce malpractice premiums, appealing to private medical providers.<sup>192</sup> They are also appealing to injured plaintiffs because they do not necessarily incorporate hard caps on recovery of economic and noneconomic damages.<sup>193</sup> These funds act as a kind of excess insurance carrier.<sup>194</sup> A private insurance company can offer medical malpractice insurance up to a certain level, after which the private entity ceases to be liable for any judgment exceeding that amount and the patient compensation fund becomes the source of satisfying the excess judgment.<sup>195</sup>

Patient compensation funds work because, in essence, they *transfer* liability from the private entity to the state-run fund. At least one state's supreme court has found that this transfer mechanism allows the scheme to survive constitutional scrutiny.<sup>196</sup> In Florida, the medical malpractice statute survived an attack on equal protection grounds because it transferred, rather than eliminated, liability for medical malpractice.<sup>197</sup> The statute immunized individual health care providers from judgments over \$100,000.<sup>198</sup> Liability for amounts over \$100,000 shifted instead to the state's patient compensation fund.<sup>199</sup> The Florida Supreme Court found that the statutory scheme survived constitutional attack because its transfer mechanism was rationally related to a legitimate state interest.<sup>200</sup>

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191. Frank A. Sloan et al., *Public Medical Malpractice Insurance: An Analysis of State-Operated Patient Compensation Funds*, 54 DEPAUL L. REV. 247, 250 (2005).

192. *Id.* at 247.

193. *Id.* at 250.

194. *Id.* at 247.

195. *Id.*

196. Fla. Patient's Comp. Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985).

197. *Id.* at 789.

198. *Id.* at 787.

199. *Id.*

200. *Id.* at 789. The court did note one potential area of concern: situations where the fund was insolvent. *Id.* The court suggested that a plaintiff might have a constitutional right to pursue its full judgment against the individual health care provider should the patient compensation fund become insolvent. *Id.* Florida's patient compensation fund ultimately closed in 1983 due to underpriced coverage. Sloan, *supra* note 191, at 248.

Among those states that have compensation funds, features vary. There are five major variations in features: funds can be entirely state-sponsored or semi-privatized,<sup>201</sup> be mandatory or voluntary, assign different price points for different specializations, feature damage caps, and even front-load or back-load in paying out losses. This Comment will suggest ideal features of a patient compensation fund in Illinois, given the state's current "medical malpractice crisis" and its unique judicial response.

With the current fiscal situation in Illinois, funding for a patient compensation system is a huge question mark. The point of noneconomic damage caps was to reduce malpractice premiums and thus the burden borne by health providers. Relying strictly on some combination of surcharges or taxes on medical health providers and primary insurers goes against the spirit of malpractice reform. On the other hand, the state is not currently in a fiscal position to subsidize excess insurance like the New York system. A hybrid approach may be the best way to fund the patient compensation fund. By imposing a small percentage surcharge on primary insurance as well as an even more minute state-wide tax, no one group bears a disproportionate burden.

If the compensation fund acts as an excess carrier at \$500,000, the same amount as the noneconomic damages cap, one can safely assume premium rates would remain at their pre-*Lebron* levels because the insurer is no longer liable after \$500,000, just like a damages cap. A slight assessment tax might be an acceptable price to pay for the stability provided by the \$500,000 "cap" on coverage from primary insurance, after which any liability for amounts exceeding \$500,000 is transferred to the compensation fund. It is important to note that, as Justice Karmer points out in his dissent, the \$500,000 cap has yet to be reached in Illinois.<sup>202</sup> This suggests that, in the beginning, the patient compensation fund need not be huge, because the number of claims exceeding \$500,000 is likely to be small, if there are any at all. The true goal is to achieve the stabilization of malpractice premiums which was ostensibly provided by the pre-*Lebron* noneconomic damages cap, but in a constitutionally acceptable form that can still make a plaintiff whole when they have been harmed by medical malpractice. In future years, if the fund succeeds in this basic goal, the excess carrier trigger can be lowered from \$500,000, the state-wide tax could be abolished, or the provider-specific tax could be tweaked to maximize the beneficial aspects of the system.

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201. Most states operated wholly state-sponsored funds with the money coming from either a provider "tax" or a surcharge on the primary insurer premium. Sloan, *supra* note 191, at 251. However, New York acts as a subsidy program, allowing physicians to choose their own private excess carrier with the state footing the bill. *Id.*

202. *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 925 (Ill. 2010) (Karmer, J., dissenting).

Mandatory and voluntary patient compensation funds each have their own benefits and drawbacks. Mandatory funds are useful because they provide a larger pool of money.<sup>203</sup> If every health provider in the state contributes to the fund, the system has a greater chance of remaining viable. More money also ensures that in those cases where a judgment does exceed the primary insurer's limits, patients are able to be fully compensated. It also reduces adverse selection, where only the high risk providers take advantage of the system.<sup>204</sup> The downside is that, in essence, a mandatory system acts as a subsidy from low-risk providers to high-risk providers, which might have takings implications.<sup>205</sup> To some extent, this can be minimized by requiring increased contributions from high-risk providers and those who repeatedly have claims. However, this can only be done to a certain extent; otherwise, the patient compensation fund will just replicate the problems of the current system. Voluntary systems present exactly the opposite benefits and detriments. Illinois should adopt a mandatory system, at least at the beginning, to spread the burden among all health providers. It ensures that there is enough money in the coffers to sustain any large judgments within the first few years of the system, allowing victims to be fully compensated for their injuries.

The third feature set is fairly self-explanatory: funds can operate at a fixed rate across the board for excess coverage or can vary their rates based on medical specialty. A fixed rate is essentially a complete subsidy of high-risk specialties by low-risk specialties, while an assessment that is an exact match of primary coverage premiums replicates the current system. All funds in existence vary based on specialties,<sup>206</sup> and there are no compelling reasons for Illinois to be the first to adopt a fixed rate assessment. The best system would be loosely based on specialties, with high-risk specialties like those in obstetrics and gynecology paying more, but not as much as their primary rate. The system should be able to tolerate a small amount of subsidization, which will take financial pressure off of those in high-risk specialties.

The fourth feature set, a cap on damages, is a nullity; *Wright, Best*, and now *Lebron* clearly indicate that these are not acceptable in Illinois.<sup>207</sup> Wisconsin, another state that utilizes a patient compensation fund, recently abolished its cap on noneconomic damages as well.<sup>208</sup>

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203. Sloan, *supra* note 191, at 251.

204. *Id.* at 268.

205. *Id.*

206. *Id.* at 251.

207. *Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736 (Ill. 1976); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997); *Lebron*, 930 N.E.2d at 895.

208. *Ferdon ex rel. Petrucelli v. Wis. Patient Comp. Fund*, 701 N.W.2d 440 (Wis. 2005).

The final structural feature of a patient compensation fund is perhaps the most important. This deals with how the fund anticipates future losses. If a fund is front-loaded, the initial start-up cost is higher because the fund assesses enough money to cover that year's anticipated losses, much like a standard insurance policy.<sup>209</sup> This has the obvious drawback of having a higher initial cost, but is a more stable model moving forward because yearly assessments do not increase or decrease sharply.<sup>210</sup> On the other hand, a back-loaded system, often called pay-as-you-go financing, requires assessments based only on losses coming due from previous years.<sup>211</sup> This means there is a lower start-up cost in the initial years of the program, providing immediate relief from high premiums.<sup>212</sup> While this has the benefit of being politically popular, it also leads to faster annual assessments as more claims come due, having the potential to result in yet another "medical malpractice crisis."<sup>213</sup>

A back-loaded system appears preferable, but the probability is high that such a system will just repeat the cycles that have led the legislature to adopt unconstitutional damage caps. Therefore, any patient compensation system in Illinois should utilize a front-loaded assessment system. The idea of a patient compensation fund is not to drastically reduce the amounts paid by health providers immediately. Rather, the system should be designed with stability *and* savings in mind. Other features of the fund can focus on savings; the financing feature set should guarantee stability such that another medical malpractice "crisis" does not rear its head in ten years.

With a patient compensation fund in this configuration, medical malpractice insurance should achieve the underlying stabilizing effects sought from damage caps without the extreme detriment to injured patients.

## V. CONCLUSION

For better or worse, Illinois will have to deal with its current "medical malpractice crisis" without the use of noneconomic damage caps thanks to *Lebron*. Ultimately, this is a good outcome given the lack of empirical evidence to suggest that caps actually effectuate lower medical costs. This is especially troublesome in light of the consequences for those most injured by health care provider negligence.

Nevertheless, rising premiums are a legitimate problem in perception, if not reality, and must be addressed by re-enacting other provisions of

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209. Sloan, *supra* note 191, at 253.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 270.



Public Act 94-677. This includes increased insurance regulation and transparency as well as an apology law. The legislature should go further and institute a patient compensation fund in order to achieve a stabilizing effect in primary insurance coverage. After a year of health care reform, Illinois should be the state to create brave new initiatives to correct the problems in the health care system.

